CHEN BOON KONG & 3 ORS.

v.

THE SUPERINTENDENT LANDS & SURVEY DEPARTMENT, 1ST DIVISION, KUCHING

HIGH COURT SABAH & SARAWAK, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J
[CIVIL APPLICATION NO. K. 12 OF 1978]
3 OCTOBER 1995

LAND LAW: *Mandamus - Acquisition of applicant's land by Government - Award granted - Dissatisfaction with award - Application to respondent to refer matter to High Court for determination under s. 57 Sarawak Land Code (Cap.81) - Application rejected - Whether application made within time - Whether application ought to be made within six weeks of the receipt of the copy of the award from the respondent or within six months from the date of the award - Section 56(3)(b) of the Code - Clerk from firm of advocates acting for applicants accepting service of award - Whether proper service pursuant to ss. 52(2) & 76(2) of the Code - Whether respondent acted correctly in rejecting the applicants' application.*

This was the applicants' application for an order of mandamus requiring the respondent to refer the matter concerning Award No. 61/1977 dated 10 December 1977 for determination of the High Court under s. 57 of the Sarawak Land Code (Cap. 81) (the Code).

The Government had acquired the applicants' parcel of land comprised in Lease of Crown Land No. 6557 and the applicants being dissatisfied with the award, through their advocates requested the respondent to refer the matter to the High Court for determination pursuant to s. 56 of the Code. The advocates subsequently received a reply from the respondent rejecting the said application on the grounds that it was made beyond the six weeks period allowed by s. 56(3) of the Code calculated from the date of the alleged receipt of the said award by the applicants on 24 December 1977. On that date a copy of the said award was in fact served on a filing clerk (Sim) in the advocate's firm while he was at the respondent's Department. The award was then collected by the applicants from the advocate's office on 30 December 1977. Accordingly, Counsel for the applicant contended that the said award was never received by the applicants within the meaning of the first limb to s. 56(3)(b) of the Code as there was no personal service on the applicants as required by s. 76(2) of the Code. Counsel further contended that service was defective as the award was not served personally on the applicants although their adresses could be ascertained contrary to the mandatory provisions of s. 52(2) of the Code. Therefore the application could be made wihin six months from the date of the respondent's award as envisaged in the second limb of s. 56(3)(b) of the Code. It was also submitted for the applicants that as s. 52(2) of the Code talks of service on all persons interested, service on the applicants' advocate was precluded. The respondent contended that it had been the accepted practice that the office would serve letters and notices including awards of the respondent for the clients of the advocates on Sim. Therefore service of the said award on 24 December 1977 on Sim as agent of the advocates acting for the applicants was constructive service on the applicants within the purpose of s. 56(3)(b) of the Code.

The main issue was whether the applicants' application ought to have been made within six weeks of the receipt of the copy of the award from the respondent or within six months from the date of the respondent's award.

Held:

[1] It has been the practice of the respondent's Department to deliver letters and notices including awards affecting landowners represented by the advocates' firm to the said Sim. In the circumstances it is fair for the respondent to assume that Sim had the authority to accept processes on behalf of the advocates' firm, if not expressed it is an ostensible one. Therefore, the award was properly served on the applicants through Sim as the proper agent of the advocates acting for and on behalf of the applicants on 24 December 1977.

[2] In order for the application of the applicants to the respondent to be competent, it must be made within six weeks from 24 December 1977 expiring on 4 February 1978 in accordance with the first limb. Since the application of the applicants was received by the respondent only on 9 February 1978, it is clearly outside the period permitted by s. 56(3)(b) of the Code and the respondent was right in rejecting such application as being made out of time.

[Application dismissed with costs to the respondent to be taxed unless agreed].

Case referred to:
OAOAM Muthiah Chettiar v. RDO [1968] 1 MLJ 107 vide [1962] 1 SCJ 696 ***(foll)***

Legislation referred to:
Bankruptcy Act 1969
Indian Code, s. 12(2)
Indian Land Acquisition Act 1894, ss. 12(2), 18
Rules of High Court 1980, O. 10 r. 1(2)
Sarawak Land Code (Cap. 81), ss. 47, 49, 51, 52(2), 56, 56(3), 56(3)(b), 57, 76, 76(2), (3)

Other sources referred to:
The Quinquennial Digest (1971-1975) Vol. 4
Interpretation of Statutes, N.S.Bindra, 6th Edn., p. 308

For the applicants - Kho Lik Kiat; M/s; Chan, Kho & Loy
For the respondent - Abdul Halim Haji Sabil

JUDGMENT

Abdul Kadir Sulaiman J:

This is an application by the applicants for an order of mandamus to be directed to the respondent requiring him within 1 month from the date of the order to refer the matter concerning award no. 61/1977 dated 10 December 1977, for determination of the High Court, under s. 57 of the Sarawak Land Code (Cap. 81), (hereinafter referred to as "the Code") on the ground that their application to the respondent requiring it be so referred was made in due time in accordance with the provisions of the second limb to s. 56(3)(b) of the Code which is within six months from the date of the respondent's award dated 10 December 1977. Their application to the respondent was made on 9 February 1978 which is within the six months period. The respondent's contention, however, is that their said application was made out of time in that it not being made within six weeks of the receipt of the copy of the award from the respondent which was alleged to be on 24 December 1977, as required by the first limb to s. 56(3)(b) of the Code.

This matter relates to the resumption or acquisition of the applicant's parcel of land by the Government under the provisions of Part IV of the Code, situate at 2½ Mile, Stampin, Kuching, Sarawak, containing an area of 5.22 acres, more or less, and comprised in Lease of Crown Land No. 6557 (hereinafter referred to as "the said land"). The applicants being dissatisfied with the award made, through their advocates, Messrs. Chan, Jugah, Wan Ullok & Co., on 3 February 1978 by letter (Exhibit MC1) requested the respondent pursuant to s. 56 of the Code to refer the matter to the High Court for its determination. The respondent received the said letter on 9 February 1978. According to MC1, the award dated 10 December 1977 was received by the advocates on behalf of the applicants, on 30 December 1977. However, on 3 April 1978, the advocates received a reply from the respondent to the effect that the matter could not be so referred as it being made beyond the six weeks period allowed by s. 56(3) of the Code calculated from the date of the alleged receipt of the said award by the applicants on 24 December 1977.

Section 56(3)(b) of the Code provides two alternative periods for the entertainment of any application by an aggrieved landowner to the Superintendent concerning the resumption of his land by the Government, requiring the Superintendent to refer for the determination of the High Court over the matter. Such application by the landowner must be made within six weeks of the receipt of the copy of the award from the Superintendent under s. 52(2) or within six months from the date of the Superintendent's award, whichever period shall first expire. The contention of the respondent is that the copy of the award was received by the applicants on a certain date and the limitation period set by s. 56(3)(b) must be calculated from that date, but according to the applicants, the said copy was never so received and therefore, the limitation period set by the said subsection must be calculated from the date of the award.

The background facts leading to this dispute is this. By notices each dated 26 October 1977 given pursuant to s. 49 of the Code, serves personally on each of four applicants, the respondent requested them to appear personally or by agent for the enquiry before him on 30 November 1977. See Exhibit E to the affidavit of Richard Jee Tzin Choi affirmed on 19 September 1978. According to Exhibit A to the said affidavit, which is a copy of the Notes of Enquiry held under the provisions of s. 51 of the Code, on 30 November 1977, Encik Mathew Chan of Chan, Jugah, Wan Ullok & Co. Advocates (hereinafter referred to as "the advocates") appeared at the enquiry representing all the four applicants. At the end of the enquiry no award was made by the respondent but indicated that it will be made in due course. On 10 December 1977 Award No. 61/1977 (hereinafter referred to as "the said award") was made by the respondent. See Exhibit STL1 to the affidavit of Sim Tiang Lim affirmed on 24 July 1978. On 24 December 1977, the copy of the said award was served on Sim Tiang Lim, a filing clerk in the advocates' firm in charge of registering conveyancing documents at the respondent's Department, when he was around making his routine search in the Valuation Section of the Department in respect of land which may be the subject of resumption by the Government. He accepted the service and signed an acknowledgment of same as in Exhibit STL2 to his affidavit on behalf of the advocates representing the applicants. According to his said affidavit, on 28 December 1977 he telephoned one Goh Kok Chiang requesting him to inform the applicants to come to the advocates' firm as soon as possible to collect the said award. On 30 December 1977 the 4th applicant called and collected the said award and went to see Mathew Chan on the matter. This fact is confirmed by the 4th applicant in his affidavit affirmed on 24 July 1978. Nothing was done until 3 February 1978 when the advocates by a letter exhibited as MC1 to the affidavit of Mathew Chan affirmed on 24 July 1978 applied to the respondent requiring that the matter of the award be referred to the High

Court pursuant to s. 56 of the Code, the objection being on the amount of compensation awarded to the applicants. In the letter it was stated that award dated 10 December 1977 was received by the firm on behalf of the applicants on 30 December 1977. Despite the admission that the said award was received by the advocates on behalf of the applicants, it is the contention of the learned Counsel for the applicants before me that the copy of the said award was never received by the applicants within the meaning of the first limb to s. 56(3)(b) of the Code. It is contended that the service of the said award was not made in accordance with s. 76(2) of the Code, on the applicants personally. Hence there is no receipt of the said award by the applicants. Therefore, the application could be made within six months from the date of the respondent's award as envisaged in the second limb to the s. 56(3)(b) of the Code. The service on Sim Tiang Lim on behalf of the advocates for and on behalf of the applicants is not proof of receipt of the said award by the applicants.

Section 76(2) states that whenever practicable the service of any notice shall be made on the person therein named. Under subsection (3) a substituted service is allowed when the person cannot be found. The contention of the learned Counsel is that as there is no evidence to say that the applicants cannot be found and the evidence is that the notice under s. 47 was personally served on the applicants, failure to comply with the requirement of subsection (2) is fatal. Further it is urged that Sim Tiang Lim has no authority to accept service of the said award on behalf of the applicants. Also that the service was defective for non compliance with the provisions of s. 52 of the Code which states:

> 52. (1) The award under s. 51 shall be filed in the office of the Superintendent and shall, except as hereinafter provided, be final and conclusive evidence as between the Superintendent and the persons interested, whether they have respectively appeared before the Superintendent or not, of the true area and value of the land and the apportionment of the compensation among the persons interested.
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> (2) The Superintendent shall serve a copy of his award on all persons interested provided that their addresses can be ascertained after reasonable inquiry when the award is made.

It is submitted by the learned Counsel that if the address of the applicants can be ascertained by the respondent, the respondent must comply with s. 52(2) which is mandatory and not directory. The purpose of the notice under s. 52 is to enable the applicants to exercise rights conferred under s. 56. In support, he cited from *The Quinquennial Digest* (1971-1975) Vol. 4 concerning s. 12(2) of the Indian Land Acquisition Act 1894 which states that the Collector shall give immediate notice of his award to such of the person interested as are not present personally or by their representatives when the award is made, as against the s. 52(2) of the Code which states that the Superintendent shall serve a copy of his award on all persons interested provided that their addresses can be ascertained after reasonable inquiry when the award is made. The learned Counsel submitted that in such a situation, the period of limitation is then six weeks. However, in our case, he submits, the award was not served personally on the applicants even though their addresses could be ascertained. If the address cannot be ascertained by the respondent, the respondent can resort to the provisions of s. 76 by way of substituted service of the award. If this is not done then the period of limitation is six months. In the present case, notice was not served under s. 52(2). Therefore, second limb of s. 56(3)(b) applies, namely, six months period of limitation. The learned author of p. 597 said of the provisions of s. 12(2) of the Indian Code that in order to enable the petitioner to exercise the valuable right conferred under s. 18 within the time prescribed, a duty is cast on the officer passing the award to serve the notice as required by s. 12(2). On s. 18 of the Indian Land Acquisition Act 1894 which is in *pari materia* with s. 56 of the

Code, where at p. 607 the learned author states that where a person has no notice under s. 12(2), an application filed by him within six months from the date of knowledge of essential contents of the award is competent. It is submitted that s. 52(2) by its express wording does not permit service on the applicants' advocate. Section 52(2) of the Code talks of service on all persons interested. Therefore, service through advocates is not effective but must be personally served on them. By analogy he cited the provisions of O. 10 r. 1(2) of the Rules of the High Court 1980 (hereinafter referred to as "the RHC") and the provisions in the Bankruptcy Act 1969 where the advocates cannot accept service of the creditor's petition on behalf of the clients. In any event, submits the learned Counsel, the address and place of service of a legal firm is its place of business and not elsewhere as in this case it was done on Sim Tiang Lim at the respondent's Department. In this case, the address of the applicants was known to the respondent at all material times. The service of the award under Part IV of the Code is a matter of law, and the procedure having been laid down, cannot be served in any manner selected by the respondent. As the award was not served on the applicants under s. 52(2), the second limb of s. 56(3)(b) applies, namely, a limitation period of six months.

For the respondent, the contention is that as regards s. 49 notice, it was served on the applicants personally because at that time the respondent was not aware of any advocate being appointed by the applicant. The respondent was aware of such appointment only for the first time when the advocate appeared at the enquiry held at his office on 30 November 1987. It is further contended that it has been the accepted practice that the office would serve letters and notices including awards of the respondent meant for the clients of the advocates on Sim Tiang Lim. So the service of the said award on 24 December 1977 on Sim Tiang Lim on behalf of the advocates acting for and on behalf of the applicants is proof that the said award was received by the applicants for purpose of s. 56(3)(b) of the Code. He cites a passage from the *Interpretation of Statutes* by N.S. Bindra, 6th Edn., at p. 308 citing the case of *OAOAM Muthiah Chettiar v. RDO* [1968] 1 MLJ 107 *vide* [1962] 1 SCJ 696 that the date of the award for purposes of computation of limitation should not be determined solely by reference to the time when it was signed by the Collector or delivered to him in his office but it must involve the question as to when it was known to the party concerned either actually or constructively. Therefore, in this case, the fact that the applicants are represented by the advocates, the service on the advocates, is constructive service on the applicants. Sim Tiang Lim is the agent of the advocates accepting service on their behalf.

The issue before me is, therefore, whether such application of the applicant made to the respondent ought to be made within six weeks of the receipt of the copy of the award from the respondent or within six months from the date of the respondents's award, whichever period shall first expire. The said award was dated 10 December 1977. Applying the 2nd limb of s. 56(3)(b) of the Code independently, such application of the applicants to the respondent for reference to the High Court must be made by 10 June 1978 and that as it was so made on 9 February 1978, such application was made well in due time. But in the light of the proviso therein provided in the said subsection, it is necessary to determine the date of the receipt of the said award by the applicants. If it can be established that the applicants have received the copy of the award, then the limitation period is only six weeks from the date of receipt thereof. The applicants contend that they never in fact received the said award from the respondent and therefore, the six months limitation period under the 2nd limb would be applicable. However, the contention of the respondent is to the contrary and that the limitation period is only six weeks from the date of receipt which according to the respondent was the date when the award was received by Sim Tiang Lim on behalf of the advocates representing the applicants, on 24 December 1977. The six week's period allowed by the first

limb to s. 56(3)(b) would expire on 4 February 1978 and therefore the application made by a letter dated 3 February 1978 as in Exhibit MC1 but received by the respondent on 9 February 1978 as evidenced in MC2 would clearly be out of time permitted by the first limb to that subsection and the respondent was right in refusing to refer the matter to the High Court for its determination.

It is not in issue here that the addresses of the applicants cannot be ascertained after reasonable inquiry is made. The contention of the respondent is that the service of the award done through Sim Tiang Lim, working for the advocates representing the applicants, following the past practice, is a service of the award on the applicants for the purpose of ss. 52(2) and 56(3)(b) of the Code. I am inclined to agree with the contention of the respondent here. According to Sim Tiang Lim in his affidavit he was at the material time a filing clerk in the firm of the advocates in charge of registering conveyancing documents at Kuching Land Registry Office. On 24 December 1977 when he was in the Kuching Land Registry Office, he was handed by Kenneth Kiong Eng Bok, a Land Valuation Officer of the respondent's Department, a number of awards, including award no. 61/1977, the said award, for distribution to the persons named therein. He signed a copy of the acknowledgment receipt though the persons named in the acknowledgment receipt are the applicants. On 28 December 1977 he telephoned one Goh Kok Chiang to inform the applicants to come to the advocates' firm to collect the said award as soon as possible and on 30 December 1977, the 4th applicant called at the firm and collected it from him and thereafter proceeded to see Mathew Chan, the advocate in charge of the matter. According to the affidavit of Kenneth Kiong Eng Bok, on that day in question Sim Tiang Lim was making a routine search in the Valuation Section of the Department in respect of land which may have been intended by the Government to resume. He affirmed that it is the practice of his office to deliver letters and notices including awards of the Superintendent addressed to the advocates' firm to the said Sim Tiang Lim. On that day when handing over the copy of the said award he stressed upon the said Sim Tiang Lim to hand the award personally and without delay to Mathew Chan who was the Counsel acting for and on behalf of the applicants. No doubt in his affidavit, Sim Tiang Lim deposed that it was outside the scope of his authority to accept service of any notices or processes on behalf of the firm. But there is no evidence to suggest that this fact was ever made known to the respondent either by the advocates' firm or by Sim Tiang Lim himself. It had been the practice of the respondent's department to deliver letters and notices including awards affecting landowners represented by the advocates' firm to the said Sim Tiang Lim. In the circumstances it is fair for the respondent to assume that Sim Tiang Lim has the authority to accept processes on behalf of the advocates' firm, if not expressed it is an ostensible one. Therefore, I am prepared to hold that in respect of this award it was properly served on the applicants through Sim Tiang Lim as the proper agent of the advocates acting for and on behalf of applicants on 24 December 1977. It is so admitted by Mathew Chan in his letter to the respondent mentioned earlier though the date differs. Therefore, for the purpose of s. 52(2) of the Code, the said award is deemed to have been served on the applicants on 24 December 1977. The fact that the notice under s. 49 was served personally on the applicants, will not in any way change the position in regard to the service of the copy of the award because by the time the award was made, if not earlier, the applicants were properly represented by the advocates. In my view, the service of the copy of the award on the advocates is a service on "all persons interested" for purpose of s. 52(2) of the Code. I am more than satisfied on the evidence that Sim Tiang Lim is the agent of the advocates. Applying my said findings for the purpose of s. 56(3)(b) of the Code, the said application of the applicants to the respondent in order to be competent must be made within

six weeks from 24 December 1977 expiring on 4 February 1978 in accordance with the first limb. The alternative provided by the second limb is not applicable in this case because the period of six months from 10 December 1977 would expire only on 9 June 1978 which is later than 4 February 1978. Since in this case, the application of the applicants was received by the respondent only on 9 February 1978, it is clearly outside the period permitted by s. 56(3)(b) of the Code and the respondent was right in rejecting such applications as being made out of time. That being the position, this application of the applicants for an order of mandamus must necessarily fail. I accordingly dismiss this application of the applicants with costs to the respondent to be taxed unless agreed.